IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

GARRY MCCRINK, SR., et al.,	:	
Plaintiffs,	:	
	:	No. 2:04-CV-01068-LDD
v.	:	
	:	Civil Action
	:	
PEOPLES BENEFIT LIFE	:	
INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM OPINION

J. Davis March 29, 2005

Presently before the Court are Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 19), filed on November 15, 2005; Defendant's Motion for Summary Judgment (Doc. No. 17), filed on November 15, 2004; and various reply and response briefs thereto (Doc. No. 28-30, 33-34, 39).

For the following reasons, the plaintiffs' motion for partial summary judgment on the breach of contract claim (Count I) is DENIED. Furthermore, defendant's motion for summary judgment is DENIED as to the breach of contract claim (Count I) and GRANTED as to the bad faith claim (Count II).

I. Factual and Procedural History

On June 7, 2001, Garry McCrink, Jr. (the "insured") applied for accidental death insurance with Peoples Benefit Life Insurance Company (the "defendant"), naming his mother, plaintiff Cheryl McCrink, as the sole beneficiary. The insurance policy (the "policy") provides $100,000 in benefits in the case of "death, due to accident." (See Policy, attached as Def. Ex. A,

at 2-3). The policy also contains a number of exclusions, one of which excludes coverage for "death caused by or resulting from . . . injury sustained as a result of operating any motorcycle, motorbike, minibike, or moped." (Id., at 3). The policy does not define the term "operating." (Id.).

On June 3, 2002, while the policy was still in effect, the insured purchased a 90cc Yamaha motorcycle (the "motorcycle"). The motorcycle was not intended for roadway use. (See Gary McCrink Sr. Deposition, attached as Ex. FF to Pl. Mot., at 65-68). The insured was not licensed to operate the motorcycle on roadways, and had never owned one before. (Id., at 107). On June 3, 2002, the insured was involved in a traffic collision involving the motorcycle and a van. (Pl. Rsp. To Def. Stat. Undisputed Facts, at ¶ 2). The insured died later that night from injuries sustained in the collision. (See Death Cert., attached as Ex. D. to Def. Mot., at 1).

Following Mr. McCrink's death, plaintiff Cheryl McCrink ("plaintiff") filed a claim for benefits with defendant under her sons' accidental death policy on July 17, 2002. (See Pl. Rsp. To Def. Stat. Undisputed Facts, at ¶ 3). Defendant's Senior Claims Examiner, Judith Hershey, conducted an investigation into the claim. (Id., at ¶¶ 3-6). This included reviewing the police report and hospital records related to the June 2, 2002 collision, telephoning the police department, and hiring a firm to interview the witnesses listed in the police report as well as the officer who took the report. (Id., at ¶ 3-8; Hershey Deposition, at 82-83, 90).

The police report contained statements from three witnesses: the driver of the van involved in the collision, Pavel Bucalov; and the drivers of the two cars that were not involved in the collision, James McElroy and Charlene Peart. (See Police Report, attached as Ex. C to Def. Mot. For SJ.). As recorded by the police report, Mr. Bucalov stated that he saw the insured

"shoot out into the street," with the motorcycle "dragging him." (Id.). Mr. McElroy stated that the insured was standing over the motorcycle, straddling it with his feet on both sides, when the bike "pul[led] from under him," shooting out into the roadway with the insured grasping onto the bike. (Id.). Ms. Peart informed the police that she "really couldn't tell" what the insured was doing before the accident. (Id.).

The investigative firm hired by defendant interviewed Officer Harrison, who completed the accident investigation. (See December 12, 2002 Investigation Report, attached as Ex. K., at 2). Officer Harrison's review of the witness statements indicated that the insured was "revving up the motor on the motorcycle as he waited for traffic to pass. The motorcycle engaged and pulled him forward into the oncoming traffic." (Id.). Although the investigative firm was instructed to interview all witnesses identified in the police report, only Mr. McElroy was interviewed concerning the facts behind the accident. (See November 18, 2002 Letter of Engagement, attached as Ex. I to Def. Mot.; Investigation Reports, attached as Ex. J-K to Def. Mot.). According to the report, Mr. McElory told the investigator that, as the motorcycle was running, he observed the insured "pull back" on the handlebars while straddling the bike, causing the bike to jump forward. (Id., at 3). Despite the insured's attempt to "restrain" the motorcycle, it "lurched forward in front of oncoming traffic." (Id.).

On January 7, 2003, Ms. Hershey informed plaintiff Garry McCrink, Sr. and plaintiff Cheryl McCrink (collectively "plaintiffs") that benefits were "not payable since Mr. McCrink was operating a motorcycle which is specifically excluded from coverage." (See January 7, 2003 Letter, attached as Ex. L to Def. Mot.). The letter stated that this conclusion was "based on the available information," with the acknowledgment that defendant would "reevaluate" plaintiffs'

claim if the information was "incomplete or inaccurate." (Id.). Plaintiff Gary McCrink, Sr. and Cheryl McCrink (collectively "plaintiffs") subsequently contacted defendant several times seeking clarification, and defendant issued several additional letters, dated January 22, 2003, February 18, 2003, and February 26, 2003, further explaining the denial of coverage under the motorcycle exclusion. (See January 22, 2003, February 18, 2003, and February 26, 2003 Letters, attached as Ex. M-O to Def. Mot.).

Through a letter dated July 29, 2003, counsel for plaintiffs informed Ms. Hershey that plaintiffs, as individuals and representatives of the insured's estate, would initiate legal proceedings against defendant, absent a granting of coverage under the policy. (See July 29 2003 Letter, attached as Ex. Q to Def. Mot., at 1). Plaintiffs' counsel argued that the movement of the motorcycle into oncoming traffic was caused by the insured's "accidental touching of the centrifugal clutch," and that, under Pennsylvania case law, the insured was not "operating" the motorcycle. (Id., at 5).

Plaintiffs' counsel also challenged the thoroughness of the investigation. Plaintiffs' counsel identified "two additional witnesses to the accident whom the police never interviewed," and who were not interviewed by defendant. (Id., at 2). These witnesses included Mr. O'Rourke, who was standing next to the insured moments before the accident, and Mr. Archinal, who was at the scene of the accident but had his backed turned at the moment of impact. (Id.). Plaintiffs' counsel even attached the affidavit of Mr. O'Rourke, who stated that prior to the accident, the insured was "straddling" the motorcycle on the sidewalk of the driveway, with the engine of the bike running. (See O'Rourke Aff., attached as Ex. R to Def. Mot., at ¶¶ 4-7). Mr. O'Rourke further testified that while he was talking to the insured, the bike lurched forward into

the curb lane of the street, despite the insured's efforts to pull the bike back into the driveway by grabbing onto the handlebars. (Id.).

Based upon the June 29, 2003 letter, defendant hired a second investigator, John Healy, to interview additional witnesses, including Mr. O'Rourke, Mr. McElroy, and Ms. Peart. These three witnesses were interviewed, although Mr. Healy only obtained written statements from Mr. McElroy and Ms. Peart. (See November 26, 2003 Letter, Peart Statement, McElroy Statement, attached as Ex. T-V). Mr. O'Rourke gave a statement consistent with his July 1, 2003 affidavit; and Mr. McElroy gave a statement consistent with the June 3, 2002 police statement. Ms. Peart elaborated upon the description she gave to the police at the time of the accident; she stated that although she was not sure whether the motorcycle engine was running prior to accident, she observed the insured "standing on the sidewalk and the bike was in the street along the curb. He appeared to be guiding it." (See Peart Statement, attached as Ex. U to Def. Mot.). Mr. Archinal was not interviewed.

Following Mr. Healy's investigation, defendant sent a letter to plaintiffs' counsel confirming that defendant's investigator interviewed Ms. Peart, Mr. McElroy, and Mr. O'Rourke, that the investigator had been unable to contact Mr. Archinal, and that information obtained from these interviews did not warrant a reversal of defendant's decision to deny coverage. (See December 8, 2003 Letter, attached as Ex. Y to Def. Mot.). Specifically, defendant emphasized that it was denying coverage because the insured's "own actions caused the motorcycle to move into the roadway," thereby "operating" the motorcycle within the meaning of the motorcycle exclusion. (Id.).

On February 11, 2004, plaintiffs filed a lawsuit against defendant. (Doc. No. 1).

Plaintiffs asserted a breach of contract claim for refusing to provide coverage under the insurance policy (Count I) and a bad faith claim pursuant to 42 Pa. Cons. Stat. Ann. § 8371. (Count II). (Doc. No. 1). Following discovery, plaintiffs filed a motion for partial summary judgment on the breach of contract claim, and defendant filed a motion for summary judgment on both claims in the complaint. (Doc. No. 17, 19).

II. Discussion

This Court must first determine what evidence it may consider in resolving the instant motions for summary judgment.

A. Motion to Strike

Defendant moves the court to strike the expert report of plaintiffs' expert, Mr. Allan Windt. According to defendant, Mr. Windt's report is riddled with impermissible legal conclusions, provides no information that could assist the fact finder in understanding a technical issue, and lacks evidentiary reliability. (See Def. Rsp. To Pl. Mot., at 8-10). Plaintiffs respond by arguing that expert testimony in insurance litigation is admissible to determine whether coverage should be provided and whether the insurer acted in bad faith. (See Pl. Reply. Br., at 10).

In reviewing a summary judgment motion, a court may only consider evidence that would be admissible at trial. See Fed. R. Civ. P. 56(e); Williams v. Borough of West Chester, Pennsylvania, 891 F.2d 458, 466 n.12 (3d Cir. 1989) (although party at summary judgment stage need not produce evidence in form admissible at trial, the evidence supplied in connection with summary judgment motion must be later admissible at trial). Evidence that would be inadmissible at trial may be stricken pursuant to Federal Rule of Civil Procedure 56. See, e.g.,

Countryside Oil Co., Inc. v. Travelers Ins. Co., 928 F.Supp. 474, 482 (D.N.J. 1995).

1. This Court will not consider expert testimony on the issue of contract construction in resolving the summary judgment motions.

An expert witness is not permitted to express legal conclusions. See Fed. R. Evid. 704(a) (permitting opinion on ultimate issue to be decided by *trier of fact*); see also Green Machine Corp. v. Zurich Am. Ins. Group, 2001 WL 1003217, at *6 (E.D. Pa. Aug. 24, 2001). The report of Mr. Windt is littered with impermissible legal conclusions on the issue of contract construction, such as Mr. Windt's finding that the term "operating" is ambiguous, that the Court should adopt the definition proffered by plaintiffs, and that defendant has not met its legal burden of proof concerning the motorcycle exclusion. See, e.g., Fisher v. Harleysville Ins. Co., 621 A.2d 158, 159 (Pa. Super. Ct. 1993) (construction of insurance contract matter of law); Haberern v. Kaupp Vascular Surgeons Ltd., 812 F. Supp. 1376, 1378 (E.D. Pa. 1992) ("While the Federal Rules of Evidence permit helpful expert opinion that embraces an ultimate factual issue to be decided, they do not permit opinion on a question of law.").

The Court also finds that Mr. Windt's construction of the insurance policy, although based upon his understanding of insurance law, which itself is the subject of a well-respected treatise, is not the proper subject of an expert report. Mr. Windt's expert testimony on the issue of contract construction, and, hence, coverage, would not assist the fact-finder in understanding a technical issue. See Fed. R. Ev. 702 (expert testimony permissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue"). Nor is it based upon reliable scientific methodology, but, instead, upon Mr. Windt's subjective interpretation of insurance case law and the application of this case

law to the instant dispute. Id. (expert testimony must be based upon reliable principles and methods).

2. This Court will consider expert testimony on the issue of bad faith in resolving the summary judgment motions.[1]

Under Pennsylvania law, expert testimony is not required as a *per se* rule in bad faith actions against insurers. See, e.g., Bergman v. United Serv. Aut. Assoc., 742 A.2d 1101, 1108 (Pa. Super. 1999). Indeed, expert testimony is often excluded on the basis that the fact finder possesses the requisite knowledge to assess the reasonableness of an insurer's conduct in denying coverage, and, thus, that expert testimony would not assist the fact finder in performing her duty. Id., at 1107; see also Datillo v. State Farm Ins. Co., 1997 WL 644076, at *5 (E.D. Pa. Oct. 17, 1998) (considering expert testimony on bad faith but noting "serious question" as to admissiblity of testimony because witness' opinion is "nothing more than subjective speculation unsupported by any scientific or specialized knowledge"). However, under Pennsylvania law, expert testimony is permitted when deemed relevant, such as in claims involving complex or highly technical insurance issues. Id., at 1107; Ford v. Allied Mutual Ins. Co., 72 F.3d 836, 841 (10th Cir. 1996) (no error when district court permits expert to testify on issue of bad faith, as opposed to contract liability); see also17 Couch on Ins. § 252:25 (3d ed. 2004) ("Testimony by an expert is almost always useful as to what facts are critical in the assessment of whether or not the insurer acted in bad faith").

Mr. Windt's expert testimony would assist the fact-finder in determining whether

---

[1]Of course, the report's ultimate conclusion that defendant acted in bad faith is inadmissible for embracing a legal conclusion. See Fed. R. Ev. 702.

defendant acted in bad faith. See, e.g., Talmage v. Harris, 354 F. Supp. 2d 860, 865-866 (W.D. Wis. 2005) (permitting expert testimony on issue of whether insurance company acted in bad faith in handling insured's claim). Accordingly, this Court denies defendant's motion to strike Mr. Windt's discussion of the factual predicate in support of plaintiffs' bad faith claim.

3. Conclusion

This Court strikes the expert report of Mr. Windt with respect to his construction of the insurance policy and his application of this construction to the factual circumstances of the litigation. However, this Court considers the expert report of Mr. Windt on the issue of bad faith. In similar fashion, this Court will also consider the defendant's expert report on the issue of bad faith.[2]

B. Summary Judgment Motions

Plaintiffs have filed a motion for partial summary judgment on the breach of contract claim, arguing that they are entitled to coverage as a matter of law in the amount of $100,000. (See Pl. Mot. For SJ.). In response, defendant has moved for summary judgment both on the breach of contract claim and the bad faith claim. (See Def. Mot For SJ.).

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson,

---

[2]The defendant's expert report is attached as Ex. AA to plaintiffs' motion.

477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

The movant has the initial burden of demonstrating the absence of genuine issues of material fact. This "burden . . . may be discharged by 'showing' that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catreet, 477 U.S. 317, 323 (1986). Once this burden is discharged, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990). A non-moving party with the burden of proof cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

In the context of insurance litigation, the insured has the initial burden to establish coverage under an insurance policy. Cont'l Cas. Co. v. County of Chester, 244 F.Supp.2d 403, 407 (E.D. Pa. 2003). On the other hand, "when the insurer relies on a policy exclusion as the basis for denying coverage, it bears the burden of proving that the exclusion applies." Id.

1. Neither party is entitled to summary judgment on the breach of contract claim because genuine issues of material fact exist as to whether the motorcycle exclusion applies.[3]

Plaintiffs contend that they are entitled to summary judgment because the insurance policy clearly covers injury related to accidental deaths. (See Pl. Mot. For SJ., 8-14). Plaintiffs

[3]Both parties agree that Pennsylvania law applies to the dispute.

further contend that the motorcycle exclusion to the insurance policy is inapplicable as a matter of law because the term "operating" is ambiguous and because, once plaintiffs' reasonable interpretation is adopted, the facts do not support a finding that the insured was "operating" the motorcycle at the time of the accident. (Id., at 13-18).

On the other hand, defendant argues that the exclusion is applicable because the term "operating" is unambiguous. (See Def. Mot., at 1-12). Defendant further argues that, based upon the unambiguous definition of "operating," defendant has met its burden of demonstrating the applicability of the exclusion as a matter of law. (Id.).

a. The term "operating" is ambiguous.

Plaintiffs contend that the term "operating" in the insurance policy is ambiguous as a matter of law. (See Pl. Mot. For SJ., at 8-14). Plaintiffs reason that the term "operating" emits more than one reasonable interpretation; it may mean: (i) control over the functioning of an object, which, in the context of a motorcycle exclusion to an insurance policy, implies management over the movement of a motorcycle; or, (ii) causing an object "work or run," which does not necessarily imply control over the motorcycle's movement. (Id.). Plaintiffs therefore invoke the well-settled principle of insurance law that ambiguous provisions must be construed against the insurer, and argues in favor of the definition of "operating" as "controlling the functioning of" an object. (Id., at 8-13).

Defendant, on the other hand, contends that the term "operating" is unambiguous, and "means essentially to cause a device to function or work." (See Def. Mot., at 5). Under defendant's definition, an insured operates a vehicle by causing the engine to run and/or by causing the vehicle to move. (Id.). The intent of the insured to control the vehicle and its

movement, however, is irrelevant.

Words of common usage in an insurance policy must be construed in their "natural, plain and ordinary sense." See, e.g., Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 108 (Pa. 1999). To perform this task, courts frequently turn to the lexicon for guidance. Id. If the policy provision of the insurance policy is unambiguous, the court must give effect to that language. Gene & Harvey Builders v. Pennsylvania Mfrs. Ass'n., 517 A.2d 910, 913 (1986). However, if the language of the insurance policy is ambiguous, the policy provision must be construed in favor of insured and in accordance with an insured's reasonable construction. Id. Contractual language is ambiguous if "it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchison v. Sunbeam Coal Co., 519 A.2d 385, 390 (1986).

This Court finds the term "operating" in the motorcycle exclusion of defendant's insurance policy to be ambiguous. See, e.g., Weinstein v. Aetna Cas. & Surety Co., 1993 WL 273427, at *4 (E.D. Pa. July 14, 1993) (finding term "operation" in automobile exclusion of insurance policy ambiguous "at best"). A reading of sundry dictionary entries for the term "operating" highlights this ambiguity. According to Merriam Webster's Collegiate Dictionary, the term "operate," when used as a transitive verb, means "to cause to function: work." See Merriam Webster's Collegiate Dictionary, at 813 (10th ed. 2001). Black's Law Dictionary echoes this definition, defining "operational" as "engaged in operation; able to function." See Black's Law Dictionary, at 1119 (7th ed. 1999). Both of these definitions support the defendant's construction of the motorcycle exclusion.

However, other dictionary entries for the term "operating" inject the requirement of

"control" into the definition of "operate." According to the American Heritage Dictionary of the English Language, the term "operate," when used as a transitive verb, means "to control the functioning of: run." (See Definitional Entry for "operate" from American Heritage Dictionary of the English Language (2000), attached as Ex. A-1 to Pl. Mot.). This definition is also found in the Oxford American Dictionary and in Funk & Wagnalls' Standard Dictionary. (See Definitional Entry for "operate" from Oxford American Dictionary and Funk & Wagnall's Standard Dictionary, attached as Ex. A-2, A-3 to Pl. Mot.). Rather than merely causing a vehicle to function, this definition of "operating" requires both: (i) the working of the vehicle; and (ii) physical control over the working of the vehicle. This definition of the term "operating" supports the plaintiffs' construction of the motorcycle exclusion.

The existence of multiple definitions of the term "operating," each with a luster of reasonableness, suggests the ambiguity of the term. See, e.g., International Union, UAW v. Mack Trucks, Inc., 917 F.2d 107, 111 (3d Cir. 1990) (contract ambiguity is the "condition of admitting of two or more meanings"). This finding of ambiguity is further supported by the defendant itself, who supplies multiple definitions for the term. For instance, defendant argues that "operating" may mean "to cause to work," while, in the same breadth, articulating that "operating" may also mean to "control the functioning of" a particular vehicle. (See Def. Mot., at 9). In fact, Brian Smith, the Direct of Claims for defendant, admitted that there is more than one reasonable definition of "operating," and that the term is ambiguous. (See Smith Deposition, attached as Ex. M to Pl. Mot., at 11).

b. The term "operating" in the motorcycle exclusion requires the insured to "control the functioning of" the motorcycle.

Because the term "operating" is ambiguous, the Court interprets the term in accordance with the insured's proposed (and reasonable) construction: as "controlling the functioning of"--running. (See Pl. Mot., at 11). Inherent in this definition are the dual definitional requirements of: (i) the functioning of the motorcycle as a mechanized vehicle capable of transportation; and (ii) the insured controlling the mechanisms of the functioning motorcycle as its driver. Pursuant to this definition, starting the engine of a motorcycle does not *per se* constitute the operation of a motorcycle, particularly if the insured does not exercise control over the mechanisms of the motorcycle while the engine is running. See, e.g., Weinstein., 1993 WL 273427, at *4 (party who physically pushes car that rolls down hill and causes injury not "operating" vehicle in part because insured did not have keys and never started vehicle).

It is important to emphasize the limitations of this definition within the wording of the motorcycle exclusion. More specifically, it is important to emphasize the appropriate definition of control in this linguistic context. The definition of the verb "control" is "to exercise power or influence over." See Black's Law Dictionary, at 330 (7th ed. 1999). In order to "operate" a vehicle, therefore, an insured only needs to exercise influence over the mechanisms of a working (ie., running) vehicle as its driver. An insured need not "intend" to cause the movement of a running vehicle. Nor need an insured "intend" the consequences of this influence. So long as the vehicle is running, however unintentionally, and so long as the insured exercises influence over the mechanisms responsible for the running of the vehicle, such as by facilitating, however unintentionally, the vehicle's movement, an insured is "operating" a vehicle for purposes of an motorcycle exclusion policy. To the extent that plaintiffs' definition of "operating" requires an insured to intend each and every movement of a running vehicle, including those that lead to the

accident, this Court rejects plaintiffs' definition as inherently unreasonable.[4] See, e.g., St. Paul Fire & Marine Ins. Co. v. St. Paul, 935 A.2d 1428, 1432 (3d Cir. 1991) (finding provision in insurance policy unambiguous in part because insured failed to offer alternative, reasonable construction of provision). Such a definition not only would contradict colloquial definitions of the term "control," but also would render the motorcycle exclusion in an accidental insurance policy meaningless, as the exclusion would be inapplicable to all insureds who suffer or cause injury by virtue of their *negligent* (ie., unintentional) maneuvering of a running motorcycle.[5]

This construction is consistent with Pennsylvania case law construing the term "operating." For instance, in Marshall v. Safeguard Mutual Fire Ins. Co., 195 A.2d 804 (Pa. Super. Ct. 1963), the Court found the phrase "is being operated" in an insurance policy to be ambiguous. Id. at 807. The Court then construed the phrase in favor of the insured, noting that the phrase "is being operated" refers to "actual physical operation." Id. The Court further cited

---

[4]The plaintiffs' argument in favor of coverage is predicated upon reading a requirement of intent into the phrase "operating a motorcycle." Plaintiffs assert:

> It is undisputed that [the insured] did not control the functioning of the Yamaha at the time of this accident . . . He did not *intend* to move the motorcycle forward and did not *intend* to enter traffic . . . Similarly, Peoples Benefit cannot establish that at the instant before the motorcycle jumped forward, it had been [the insured's] *intent* to touch/move that part of the motorcycle that cause it to jump or move forward.

(See Pl. Mot., at 13) (emphasis added).

[5]The Court also notes that the phrasing of the motorcycle exclusion as a whole renders the insured's intent at the precise moment of the accident non-dispositive. For instance, the exclusion does not make the applicability of the exclusion co-extensive with an insured's control of the vehicle at the time of the accident. Instead, the policy precludes coverage for "injury sustained *as a result* of operating any motorcycle . . ." (See Policy, at 3) (emphasis added). So long as the insured controls the functioning of the vehicle, and so long as injury occurs as a "result" of this control, regardless of whether such control was exercised immediately preceding the accident, the exclusion is applicable.

with approval a treatise concluding that the word "operate" in automobile insurance policies frequently means "to regulate and control the management or operation of the car, that is to have charge of it as the driver." Id. Applying this definition, the Court found that a policy exclusion for operating an automobile by anyone other than the named insured was inapplicable, as the automobile had been parked, and left unoccupied and unattended, for a period of five minutes prior to the vehicle drifting back and colliding with other vehicles. Id. at 809.

At least one federal district court construing the term "operating" under Pennsylvania law has reached a similar result. In Weinstein v. Aetna Cas. & Surety Co., the court construed the term "operated" in a motor vehicle exclusion to an insurance policy as requiring something more than the term "use." 1993 WL 273427, at *3 (E.D. Pa. July 14, 1993). The court cited with approval the definition of "operate" as "running or controlling the function of." Id. Applying this definition, the Court concluded that the motorcycle exclusion did not bar coverage to an insured who was physically pushing a car from behind, without keys and while the engine was not running, prior to the car rolling down a hill and causing injury to three bystanders, because the insured did not "work the mechanism[s] of the vehicle nor did he control its function." Id. at *4; see also Maryland v. Marshbank, 226 F.2d 637, 639 (3d Cir. 1955) (distinguishing between use and operation in insurance contract and finding that "operation" involves "direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle").

The Pennsylvania Supreme Court has not defined the term "operating" in an insurance policy. See, e.g., Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000) (federal court sitting in diversity jurisdiction must apply state law as interpreted by the Pennsylvania Supreme Court). Nonetheless, defendant provides no persuasive support why the Pennsylvania

Supreme Court would disagree with the holdings of Marshall and Weinstein. See, e.g., Commercial Union Ins. Co. v. Bituminous Casualty Corp., 851 F.2d 98, 100 (3d Cir. 1988) (in predicting how Pennsylvania Supreme Court would rule, "decisions of lower appellate courts may be persuasive, should be accorded proper regard and are presumptive evidence of state law"); Bufetta, 230 F.3d at 637 ("opinions of intermediate appellate courts are not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise"). Consequently, this Court follows Marshall and Weinstein, and holds that the motorcycle exclusion is applicable so long as the death of the insured was the "result" of the insured's control over the functioning of the motorcycle.

c. Genuine issues of material fact exist as to whether the insured's injuries were "sustained as a result of operating" the motorcycle.

This Court has defined the term "operating" within the instant motorcycle exclusion as requiring injury to result from: (i) a functioning vehicle; and (ii) the insured's exercise of influence over the mechanisms that cause the vehicle to function. Because of the existence of different factual narratives concerning the accident, neither party is entitled to summary judgment on the breach of contract claim.

i. A genuine issue of material fact exists as to whether the motorcycle was functioning at the time of the accident.

A genuine issue of material fact exists as to whether the motorcycle was functioning at the time of the accident. On one hand, Mr. O'Rourke provides affidavit testimony that he was standing beside the insured at the moment before the accident, and observed that the engine was running. (See O'Rourke Aff., attached as Ex. R to Def. Mot., at ¶ 4). However, another witness

to the accident, Mr. McElroy, did not hear the revving of the engine, and was thus unsure as to whether the motorcycle was running at the time. (See McElroy Deposition, attached as Ex. G to Pl. Mot., at 70). Nor did Mr. Bucalov know if the engine was on. (See Bucalov Deposition, attached as Ex. Z to Pl. Mot., at 29). Furthermore, Ms. Peart, who was driving behind the driver who struck the insured, testified at her deposition that although she could not definitively tell whether the engine of the motorcycle was running, the motorcycle did not "appear to be" running because of the lack of propulsion. (See Peart Deposition, attached as Ex. H to Pl. Mot., at 31).[6] Instead, Ms. Peart observed that the motorcycle fell out of the insured's hands, and, after the insured reached for and chased the motorcycle, he was struck by the van. (Id., at 18-19, 26). Consequently, a genuine issue of material fact exists as to whether the engine of the motorcycle was on, and, hence, whether the motorcycle was functioning at the time of the accident.

ii. A genuine issue of material fact exists as to whether the insured controlled the functioning of the motorcycle.

Although a genuine issue of material fact exists as to whether the motorcycle was running at the time of the accident, plaintiffs would still be entitled to summary judgment on the issue of contract liability by showing that, assuming the functioning of the vehicle, no reasonable juror could find that the accident was the result of the insured exercising influence over the

---

[6] To the extent that defendant seeks to strike the statements of Ms. Peart as speculative, and, hence, irrelevant pursuant to Federal Rule of Civil Procedure 401, this Court denies defendant's request. (See Def. Rsp. Br., at 7). Ms. Peart had personal knowledge concerning the accident, and averred in her deposition that the motorcycle did not "appear" to be running based upon her first-hand observation and assessment of the insured's interaction with the motorcycle preceding the accident. (See Peart Deposition, at 31, 90-91). Such testimony makes the existence of a fact "more or less probable," and is admissible for purposes of this summary judgment motion. See Fed. R. Ev. 401 (evidence relevant if it makes existence of material fact more or less probable than it would be without evidence).

mechanisms of the motorcycle. This Court finds that a genuine issue of material fact exists as to whether the second-prong of the definition of "operating" has been met.

Eye-witnesses present two different factual narratives regarding the accident. On the one hand, James McElroy and John O'Rourke testified during their depositions that prior to the accident the insured was straddling the bike, without sitting on the vehicle, with his hands on the handlebars. (See McElroy Deposition, at 70, 95; O'Rourke Aff., at ¶¶ 3-8). In his July 23, 2003 letter, plaintiffs' counsel further suggested that the movement of the motorcycle was due to the insured's accidental touching of the centrifugal clutch. (See July 23, 2003 letter, at 5). This recitation of the events leading up to the injury suggests that the insured did not intend to cause the vehicle to enter traffic, but that insured's injury was a result of his accidental exercise of influence of the vehicle's mechanisms (such as the clutch), and, thus, of his "operating" the motorcycle.

On the other hand, Charlene Peart testified during her deposition that the insured was walking with the motorcycle when the motorcycle slipped out of his hands and tumbled into oncoming traffic. (See Peart Deposition, attached as Ex. U to Pl. Mot., at 18-20, 32, 89). As the insured reached for the motorcycle, he was struck and killed by an oncoming van. (Id., at 18-19, 26). Based upon this testimony, a reasonable juror could conclude that the bike falling out of the insured's possession, rather than the insured accidentally hitting the centrifugal clutch, caused the vehicle to move. Thus, pursuant to this narrative, a reasonable juror could conclude that the insured did not exercise influence over the mechanisms that permit the vehicle to function as a vessel of transportation.

2. Defendant did not act in bad faith in denying coverage to plaintiffs.

Defendant argues that it is entitled to summary judgment on the bad faith claim because defendant reasonably construed the motorcycle exclusion, conducted a reasonable investigation, and timely resolved the claim based upon the facts it uncovered through its investigation. (See Def. Mot., at 13-24). Plaintiffs, on the other hand, contest this analysis, noting that there are genuine issues of material fact from which the jury could find bad faith on the part of the defendant. Specifically, plaintiffs note that defendant failed to construe properly the policy, failed to conduct a fair and complete investigation, and refused to extend coverage despite the existence of facts requiring coverage. (See Pl. Rsp. To Def. Mot., at 15-25).

a. Standard

Pennsylvania's bad faith statute provides that a court may award certain remedies if "the court finds that the insurer has acted in bad faith toward the insured . . . ." 42 Pa. Cons. Stat. Ann. 8371. Bad faith is defined as "any frivolous or unfounded refusal to pay proceeds of a policy." Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688-690 (Pa. Super. Ct. 1994) To recover pursuant to Pennsylvania's bad faith statute, a plaintiff must establish by clear and convincing evidence that: (i) the defendant did not have a reasonable basis for denying benefits under the policy and; (ii) defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim. Terletsky, 649 A.2d at 688-690. Consequently, in order to survive a motion for summary judgment, plaintiff "must present sufficient evidence such that, if believed, a jury could find bad faith under the clear and convincing standard." Krisa v. Equitable Life Assurance Soc'y., 113 F.Supp.2d 694, 703 (M.D. Pa. 2000).

Although an insurer need not have been motived by an improper purpose, such as ill will or self-interest, negligence does not rise to the level of bad faith. Klinger v. State Farm Mut.

Auto. Ins. Co., 115 F.3d 230, 233-34 (3d Cir. 1997). As such, "bad faith cannot be found where the insurer's conduct is in accordance with a reasonable but incorrect interpretation of the insurance policy and the law." Bostick v. ITT Hartford Group, Inc., 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999). Furthermore, an insurer "is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion." Krisa, 113 F. Supp. 2d at 703.

b. Defendant had a reasonable basis for denying coverage.

i. Defendant's construction of "operating" was reasonable.

Plaintiffs argue that the defendant's ultimately inapplicable definition of "operating" was evidence of bad faith, in part because the defendant failed to conduct research on the definition of "operating" under Pennsylvania law. (See Pl. Mot., at 23-24).

A determination of bad faith does not privilege the insured's reasonable expectations. As such, it is not the insured's construction of the coverage provisions that dictates whether a defendant acted in bad faith in denying coverage. See, e.g., Krisa, 113 F. Supp. 2d 694, 704 (M.D. Pa. 2000) ("bad faith is not established if there is any reasonable interpretation that supports a coverage determination favoring the insured"). Instead, so long as the insurance company adopts a reasonable construction of the policy, and then uses this reasonable construction to shape the contours of an otherwise thorough investigation, a plaintiff can not meet her burden of establishing bad faith by clear and convincing evidence. Id., at 705 (summary judgment for insurer on bad faith claim because insurer's information concerning claim provided reasonable foundation for withholding disability benefit payments based upon reasonable

interpretation of policies' coverage provisions); Bostick, 56 F. Supp. 2d at 587 (summary judgment for insurer on bad faith claim because insurer based conduct on reasonable, albeit incorrect, interpretation of insurance policy).

The defendant's construction of the term "operating" was reasonable. The insurance policy did not define the term "operating." (See Policy, attached as Ex. B to Pl. Mot.). Nor did the defendant's manuals or other educational materials for handling claims define this term. (See Def. Discovery Answers, attached as Ex. 3-4 to Pl. Br. In Opp'n to Def. Mot.). Without these authoritative sources, defendant's insurance adjustors adopted one of the various dictionary definitions of "operating": as causing a vehicle to function. (See January 22, 2003 Letter and December 8, 2003 Letter, attached as Ex. M, Y to Def. Mot.).

This Court further notes that legal research on the definition of "operating" prior to the January 22, 2003 letter would not have modified the defendant's construction of the policy or the claims analysis. The Pennsylvania Supreme Court has not construed the term "operating" in an insurance policy. Furthermore, Pennsylvania case law on the construction of the term "operating" suggests different definitions depending upon the factual and legal context. Compare Love v. City of Philadelphia, 543 A.2d 531, 533 (Pa. 1988) (defining term "operation" in Political Subdivision Tort Claims Act as "actually putting something into motion," as compared to acts taken in preparing or ceasing to operate a vehicle) with Marshall, 195 A.2d at 809 (construing phrase "is being operated" in insurance policy to mean "actual physical control" of automobile). Even this case law on what conduct constitutes "operation" has been recognized as vague "at best." See, e.g., Weinstein, 1993 WL 273427, at *8 (summary judgment for defendant on bad faith claim in part because "case law is somewhat ambiguous as to what constitutes

'operation' and a legal result depends upon the individual facts of each case"). In fact, the few cases that have construed the term "operating" in an insurance policy have done so with facts significantly different than the facts at issue in this instance case. See Marshall, 195 A.2d at 809 (construing phrase "is being operated" in context of parked car which rolls backward into other vehicles); Weinstein, 1993 WL 273427, at *8 (construing "operated" in context of van being pushed from behind by insured, while engine is off).[7] Consequently, without dispositive case-law defining the term "operating" in an insurance policy, no reasonable juror could attribute to defendant bad faith for preceding according to a reasonable, vernacular understanding of the term "operating," even without first surveying the cloudy landscape of Pennsylvania case law. See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co., 626 A2d 502, 510 (Pa. 1993) (affirming summary judgment for insured on bad faith claim because no bad faith when insured relies on reasoning and approaches of other courts when Pennsylvania lacks definitive precedent).

ii. Defendant's investigation was reasonable.

It is clear that defendant construed the motorcycle exclusion in a reasonable, albeit ultimately erroneous, manner. It is also clear that, using this reasonable construction as a guide, the defendant conducted a fair and thorough investigation and made a reasoned assessment of the claim based upon this record. Grayboyes v. Gen. Am. Life Ins. Co., 1995 WL 156040, at *8 (E.D. Pa. April 4, 1995); see also Cantor v. Equitable Life Assurance Soc'y, 1999 WL 219786, at *3 (E.D. Pa. April 12, 1999) (to defeat bad faith action, insurance company "simply must show it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its

[7]Defendant performed legal research on what constitutes "operating" a motorcycle under Pennsylvania law after receipt of the July 29, 2003 letter from plaintiffs' counsel. (See December 8, 2003 Letter from Defendant's Counsel, attached as Ex. Y to Def. Mot.).

action”).

No evidence exists to demonstrate bad faith in any stage of the defendant’s investigation. First, immediately after the accident, defendant’s Senior Claims Examiner, Ms. Hershey, requested the insured’s hospital records and police report. (See Hershey Deposition, attached as Ex. J to Pl. Mot., at 70-81). Both the hospital records and the police report designated the insured as the “operator” and “driver” of the motorcycle. The police report provided summaries of the accident from three eye-witnesses, Mr. Bucalov, Mr. McElory, and Ms. Peart. (See Police Report, attached as Ex. C to Def. Mot.). These witnesses indicated that the insured had the keys to the motorcycle, that his motorcycle was running, and that he was straddling the motorcycle with his hands on the handlebars just prior to the accident. (Id.).

In addition to reviewing the hospital records and police report, defendant also hired an investigation firm prior to making a coverage determination. This investigation firm was instructed to interview witnesses listed in the police report and to interview Police Officer Harrison to determine if the motorcycle’s engine was running and if the insured “was considered to be operating the motorcycle at the time of the accident.” (See November 18, 2002 Letter, attached as Ex. I to Def. Mot.). The lead investigator spoke with Mr. McElroy and Officer Harrison, who indicated that “witness statements suggested that he [the insured] was revving up the motor on the motorcycle as he waited for traffic to pass.” (See December 24, 2002 Report, attached as Ex. K to Def. Mot., at 2). Although it is true that the lead investigator failed both to interview two witnesses in the police report, Ms. Peart and Mr. Bucalov, and to obtain signed statements from the witnesses that were interviewed, no reasonable juror could conclude that this deviation on the part of the investigation firm from the defendant’s guidelines for conducting the

investigation constituted more than mere negligence. See, e.g., Frog, Switch Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.2d 742, 751 n.9 (3d Cir. 1999); Brown v. Progressive Ins. Co., 860 A.2d 493, 501 (Pa. Super. Ct. 2004) (mere negligence or bad judgment not bad faith).

Furthermore, after receiving the July 29, 2003 letter from plaintiffs' counsel, defendant agreed to reopen the investigation and to hire a second investigative firm. This investigation was performed despite facts in the July 29, 2003 letter that reiterated the validity of defendant's position, such as Mr. O'Rourke's affidavit averring that the motorcycle was running and that the insured's manipulation of the clutch caused the vehicle's movement. Ms. Peart, Mr. O'Rourke, and Mr. McElroy were interviewed as part of this supplemental investigation. Although the interviewer failed to adhere faithfully to the list of questions prescribed by defendant, these interviews elicited facts that indicated that the insured was operating the motorcycle within defendant's understanding of the term. (See John Healy Deposition, attached as Ex. S to Pl. Mot., 60-62; O'Rourke and Peart Statements, attached as Ex. T-U to Def. Mot.). A letter explaining the rationale for denying coverage after the conclusion of this second investigation was promptly sent on December 8, 2003.

In finding that no genuine issues of material fact exist as to the reasonableness of defendant's investigation, this Court rejects plaintiffs arguments to the contrary. First, plaintiffs argue that defendant's investigation was improper because, prior to the initial denial of coverage on January 7, 2003, the defendant failed to interview directly the eye-witnesses to the accident, failed to inspect the motorcycle, and failed to determine how the centrifugal clutch on the motorcycle worked. (See Pl. Br. In Opp'n., at 22-24). Plaintiffs criticisms do not belie the adequacy of defendant's foundation for denying coverage. See, e.g., Quaciari v. Allstate Ins. Co.,

998 F. Supp. 578, 581 n. 3 (E.D. Pa. 1998) (summary judgment for insurer when reasonable basis exists to deny coverage). Indeed, plaintiffs fail to establish how inspection of the motorcycle and an understanding of the functioning of the centrifugal clutch would have generated a more relevant record upon which to make a decision. Nor do plaintiffs provide a persuasive reason why defendant needed to interview witnesses who were not identified as eye-witnesses in the police report. Defendant's investigation–the interviews of Mr. McElroy and the officers at the scene of the accident, a reading of the descriptions of the accident provided by Mr. Bucalov and Ms. Peart in the police report, and an assessment of the medical reports–was sufficiently thorough to yield an appropriate foundation to confirm the defendant's belief that the insured was "operating" the motorcycle in accordance with the defendant's reasonable construction of this term. See, e.g., Mann v. UNUM Life Ins. Co. Of America, 2003 WL 22917545, at *8 (no bad faith because although speaking with doctors might have produced a more thorough investigation prior to denial of coverage, insurer still retained reasonable basis for denying coverage); Terletsky, 649 A.2d at 688.

Second, plaintiffs argue that defendant impermissibly and in bad faith displaced the burden of investigation onto plaintiffs. (See Pl. Mot., at 23). This argument mis-characterizes the evidence. Rather than shifting the burden of investigating the claim and of demonstrating the inapplicability of the motorcycle exclusion onto plaintiffs, defendant conducted its own thorough investigation, formulated a conclusion based upon its definition of "operating," and, in denying the claim, informed plaintiffs that they had the opportunity to contest this conclusion upon the submission of new evidence. The opportunity to offer new evidence after a thorough investigation suggests a decisional flexibility, a good faith desire to reevaluate the

appropriateness of the denial of coverage. See Mann, 2003 WL 2291745, at *8 (inviting claimant to submit additional information upon availability not evidence of bad faith if insurer has reasonable basis for denying coverage). While the converse might be true, that denying plaintiffs the opportunity to challenge the coverage decision prior to spending significant sums of money through litigation may constitute evidence of bad faith, voicing a willingness to reopen a previously concluded investigation fails to rise to the level of bad faith.

iii. Defendant's decision not to extend coverage was reasonable.

Plaintiffs argue that the result of the insurer's investigation produced a factual understanding of the accident that demanded coverage; or, then again, failed to produce a factual understanding that confirmed the applicability of the motorcycle exclusion. (See Pl. Br. In Opp'n, at 24). Specifically, plaintiffs' expert, Mr. Windt, argues that insurer acted in bad faith by denying coverage because, based upon the insurer's knowledge of the facts surrounding the incident, there was no way for the insurer to know whether the insured intended to cause the motorcycle to jump into traffic, as compared to accidentally touching a mechanism that caused the vehicle to move. (See Windt Report, attached as Ex. AA to Pl. Mot., at 5-8). Again, this Court disagrees.[8]

---

[8]Plaintiffs' argument on this issue is predicated upon the erroneous assumption that defendant's construction of the term "operating" was unreasonable. It is also predicated upon the erroneous construction of "operating" as requiring an "intent" to facilitate the movement of the vehicle and/or the consequences of this movement. These errors are in part products of the plaintiffs' incorrect methodology, which demands an assessment of the defendant's decision to deny coverage based upon the Court's ultimate legal construction of the policy, rather than upon the reasonableness of defendant's construction, and of the application of this construction, at the time of the denial of coverage. This line of reasoning ignores the rule that bad faith does not attach to an investigation and to the denial of coverage when an insurer makes and applies a reasonable, albeit erroneous, construction of an undefined term in a policy. See, e.g., Bostick, 56

Using the defendant's reasonable construction of the policy as the gauge to determine whether the defendant acted in bad faith by denying coverage, this Court finds that the factual record supported defendant's conclusion that the insured's death was the result of putting the vehicle into motion. The defendant initially denied coverage based upon the police and hospital reports, and the interviews with Mr. McElroy and Officer Harrison. This investigation revealed that the insured was straddling the motorcycle and that, however accidental, the insured's manipulation of the mechanisms of the motorcycle caused it to jump into traffic. No evidence suggested that the insured did not put the vehicle into motion, and, therefore, the defendant acted reasonably in denying coverage on January 22, 2003.

Nor does evidence exist to suggest that defendant denied coverage in bad faith after the letter from plaintiffs' counsel on July 29, 2003. Indeed, plaintiffs' counsel admitted that the insured accidentally touched the centrifugal clutch, thereby causing it to lurch into the street. (See July 29, 2003 Letter, attached as Ex. Q to Def. Mot., at 5). Moreover, the affidavit of Mr. O'Rourke indicated that the engine of the motorcycle was running, and that the insured was straddling the bicycle. (See O'Rourke Aff., attached as Ex. Q to Def. Mot.). Subsequent interviews failed to discredit this testimony. In fact, although Ms. Peart stated in her deposition that it not appear the motorcycle was "running," her statement to the police and the defendant's investigator suggested greater uncertainty as to whether the motorcycle's engine was on. (See Peart Deposition, attached as Ex. H to Pl. Mot., at 31; Police Report, attached as Ex. C to Def. Mot.). Based upon these facts, and armed with its reasonable construction of the exclusion, the

---

F. Supp. 2d at 587.

defendant reasonably concluded that it was denying coverage because “it appears that McCrink’s own actions caused the motorcycle to move into the roadway.” (See December 8, 2003 Letter, attached as Ex. Y to Def. Mot.).

III. Conclusion

For the foregoing reasons, this Court DENIES both parties’ motions for summary judgment on the breach of contract claim. However, this Court GRANTS defendant’s motion for summary judgment on the bad faith claim. An appropriate ORDER follows.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

GARRY MCCRINK, SR., et al.,	:	
Plaintiffs,	:	
	:	No. 2:04-CV-01068-LDD
v.	:	
	:	Civil Action
	:	
PEOPLES BENEFIT LIFE	:	
INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this _29th_ day of March 2005, upon consideration of Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 19), Defendant's Motion for Partial Summary Judgment (Doc. No. 17), and all reply and response briefs thereto (Doc. No. 28-30, 33-34, 39), it is hereby ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 19) is DENIED.
2. Defendants' Motion for Partial Summary Judgment (Doc. No. 17) is DENIED as to the breach of contract claim. Defendants' Motion is GRANTED as to the bad faith claim.

BY THE COURT:

__/s/____________
Legrome D. Davis, J.